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12          **UNITED STATES DISTRICT COURT**  
13          **DISTRICT OF NEVADA**

14          **FEDERAL TRADE COMMISSION,**

15           **Plaintiff,**

16           **vs.**

17          **SEQUOIA ONE, LLC, a Wyoming limited**  
18          **liability company, GEN X MARKETING**  
19          **GROUP, LLC, a Florida limited liability**  
20          **company, JASON A. KOTZKER,**  
21          **THERESA D. BARTHOLOMEW, JOHN**  
22          **E. BARTHOLOMEW, JR., AND PAUL T.**  
23          **MCDONNELL,**

24           **Defendants.**

25          **CASE NO. 2:15-cv-01512-JCM-CWH**

26          **NOTICE OF MOTION AND MOTION TO**  
27          **STAY CIVIL ACTION PENDING**  
28          **RESOLUTION OF CRIMINAL**  
29          **PROCEEDINGS; MEMORANDUM OF**  
30          **POINTS AND AUTHORITIES;**  
31          **DECLARATION OF JEFFREY B.**  
32          **SETNESS; DECLARATION OF JASON A.**  
33          **KOTZKER**

34          TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

35          COMES NOW Defendant JASON A. KOTZKER by and through his counsel, Jeffrey B.  
36          Setness of the law firm of Fabian & Clendenin, P.C. and hereby moves this Court for an order  
37          staying this civil action as against Kotzker pending the resolution of the ongoing federal criminal  
38          investigation against Kotzker.

39          This Motion is made on the grounds that a stay of this civil action is necessary to protect  
40          Kotzker's Fifth Amendment rights in connection with the ongoing federal criminal investigation  
41          which relates to, among other things, the same underlying facts that give rise to this action. This  
42          Motion is based on:

- 43           1.       This Notice of Motion and Motion;  
44           2.       The Memorandum of Points and Authorities that follows;

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45          **KOTZKER'S MOTION TO STAY CIVIL ACTION**

- 1           3. The Declaration of Jeffrey B. Setness;  
2           4. The Declaration of Jason A. Kotzker;  
3           5. All pleadings and files in this matter; and  
4           6. Such additional evidence and argument as may be permitted by the Court.

5  
6           **DATE**

*Oct 2, 2015*  
**Fabian VanCott**

7           By:

*[Signature]*  
**JEFFREY B. SETNESS**  
*Attorneys for Defendant Jason A. Kotzker*

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

The above-captioned civil action commenced by Plaintiff Federal Trade Commission (hereinafter "FTC") against Kotzker and others arises from some of the same facts that are currently being investigated by the U.S. Postal Inspection Service, the U.S. Department of Justice, and the U.S. Attorney's Office for the District of Nevada.

In light of this ongoing federal criminal investigation, Kotzker should not be forced to choose between defending himself in this civil action brought by one federal government agency (the FTC) and preserving his Fifth Amendment rights in the ongoing federal criminal investigation being conducted by other federal government agencies (U.S. Postal Inspection Service, the U.S. Department of Justice, and the U.S. Attorney's Office for the District of Nevada). To protect his Fifth Amendment rights, a stay of this civil proceeding is required during the pendency of ongoing parallel federal criminal investigation.

14 The dilemma facing a court in a situation such as this was explained quite eloquently by  
15 former United States District Court Judge Milton Pollack in his October 1989 presentation at the  
16 Transferee Judges' Conference entitled *Parallel Civil and Criminal Proceedings* when he stated  
17 that:

When parallel civil and criminal actions arising from the same transactions or issues have been instituted, a court is faced with a dilemma. On the one hand, a parallel civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery or testimony elicited in the civil litigation. This also may cause him to confront the prospect of divulging information which may incriminate him. On the other hand, the pendency of a parallel criminal proceeding can impede the search for truth in the civil proceeding if the accused resists disclosure and asserts his privilege against self-incrimination and thereby conceals important evidence. It may be that the Government seeks to withhold discovery which is § 3500 material for the criminal trial and thereby deprives the defendant in the civil case of the means to defend fully therein.

(Emphasis added and underlining added.) *Parallel Civil and Criminal Proceedings*, Milton Pollack, J., U.S. Dist. Ct., S.D.N.Y., 129 F.R.D. 201, (Oct. 17-19 1989).

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1       **II. FACTUAL BACKGRPOUND**

2           The following factual background is provided:

3           **A. December 2014 Grand Jury Subpoena**

4           In early December 2014, Kotzker, received a Grand Jury Subpoena addressed to Sequoia  
5 One, LLC from Assistant United States Attorney Christina Brown demanding the production of  
6 records relating to ProCheck LLC, Gareth David Long, and others.

7           It is widely known that the issuance of a grand jury subpoena by an Assistant United States  
8 Attorney is evidence that a federal criminal investigation is underway and it is worthy of note that  
9 this grand jury subpoena was issued to Sequoia One, LLC who is a named defendant in the  
10 above-captioned civil action.

11          **B. January 7, 2015 Interview of Kotzker**

12          On January 7, 2015, Postal Inspector Clayton Gerber and another Postal Inspector of the  
13 United States Postal Inspection Service appeared at Kotzker's residence in Highlands Ranch,  
14 Colorado and requested that Kotzker submit to an interview. During the course of this interview  
15 which lasted approximately two hours, the Postal Inspectors asked Kotzker questions regarding,  
16 among other things, Kotzker's relationship and dealings with various individuals and entities  
17 including but not limited to: (1) Theresa Bartholomew; (2) John E. Bartholomew, Jr.; (3) Paul T.  
18 McDonnell; (4) Gen X Marketing Group, LLC; and (5) Sequoia One, LLC.

19          According to the Mission Statement of the United States Postal Inspection Service,

20          U.S. Postal Inspectors are federal law enforcement officers who  
21 carry firearms, make arrests, execute federal search warrants, and  
22 serve subpoenas. Inspectors work with U.S. Attorneys, other law  
23 enforcement, and local prosecutors to investigate cases and prepare  
24 them for court. Inspectors throughout the country enforce roughly  
25 200 federal laws related to crimes that adversely affect or entail  
26 fraudulent use of the U.S. Mail, the postal system, postal employees,  
27 and customers.

28          A copy of the United States Postal Inspection Service Mission Statement is attached  
as **Exhibit 1** to the Declaration of Jeffrey B. Setness.

29          //

30          //

1       Second, many of the Postal Inspectors' questions during this lengthy  
2 interview related to the vary individuals and entities who are also named as  
3 defendants in the above-captioned civil action.

4           **C. January 22, 2015 Proffer at the United States Attorney's Office in Denver**

5       On January 22, 2015, Kotzker and his counsel attended a proffer at the United States  
6 Attorney's Office in Denver, Colorado which was attended by Assistant United States Attorney  
7 Christina Brown, Department of Justice Trial Attorneys Josh Burke and David Frank, and Postal  
8 Inspector Gerber. This proffer lasted for approximately 5 ½ hours and, during the proffer, Kotzker  
9 was asked questions regarding, among other things, his involvement with: (1) Theresa  
10 Bartholomew; (2) John E. Bartholomew, Jr.; (3) Paul T. McDonnell; (4) Gen X Marketing Group,  
11 LLC; and (5) Sequoia One, LLC.

12       A substantial number of the questions posed by these federal law enforcement officers  
13 related to the same individuals and entities who are named as defendants in the above-captioned  
14 civil action.

15           **D. January 30, 2015 Plea Offer**

16       On January 30, 2015, the Department of Justice submitted a plea offer to counsel for  
17 Kotzker which would require Kotzker to plead guilty to a federal felony.

18       Based upon the foregoing facts, the following conclusions can reasonably be drawn:

19           1.       This pending FTC civil action is based upon some of the same facts that are  
20 currently under investigation by the U.S. Postal Inspection Service, the U.S. Department of  
21 Justice, and the U.S. Attorney's Office for the District of Nevada.

22           2.       Based upon the submission of a plea offer to Kotzker in January 2015, it is  
23 clear that Kotzker has been and continues to be a target of a federal criminal investigation.

24           3.       The adjudication of this civil action would implicate many of the factual  
25 issues underlying the criminal investigation.

26           4.       It is reasonable to conclude that there is a possibility that at some point in  
27 time this matter may be presented for an indictment.

28       //

1           5. Any discovery propounded by the FTC on Kotzker in this action will  
 2           implicate Kotzker's Fifth Amendment rights in the ongoing federal criminal investigation.  
 3           Kotzker should not be forced to choose between defending himself in this federal civil  
 4           action brought by one federal government agency and preserving his Fifth Amendment rights in a  
 5           federal criminal investigation instituted by other federal government agencies. In addition,  
 6           without a stay, these federal law enforcement agencies would undoubtedly monitor these civil  
 7           proceedings hoping to obtain incriminating testimony through civil discovery which not only  
 8           undermines the Fifth Amendment privilege, but also violate concepts of fundamental fairness.

9           **III. ARGUMENT**

10          **A. Fifth Amendment**

11          The Fifth Amendment to the United States Constitution states, "No person . . . shall be  
 12          compelled in any criminal case to be a witness against himself . . ."

13          The Fifth Amendment Privilege against self-incrimination may be asserted in a deposition  
 14          in a civil case. In the case of *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir.  
 15          2000), the Ninth Circuit stated that ". . . Notwithstanding the text that seemingly limits the right  
 16          against self-incrimination to the criminal context, the Fifth Amendment's protections have been  
 17          deemed to apply to civil proceedings. *See Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38  
 18          L.Ed.2d 274 (1973)." Therefore, Kotzker would have the right to assert his Fifth Amendment  
 19          privilege at practically every stage of the above-captioned civil action, including, but not limited  
 20          to, discovery.

21          In *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000), the Ninth  
 22          Circuit stated that ". . . Therefore, the "privilege against self-incrimination does not depend upon  
 23          the likelihood, but upon the possibility of prosecution" and also covers those circumstances where  
 24          the disclosures would not be directly incriminating, but could provide an indirect link to  
 25          incriminating evidence. (Citation omitted.) . . ." In *United States of America v. Cuthel, et al.*, 903  
 26          F.2d 1381, 1384 (11th Cir. 1990), the Eleventh Circuit stated that ". . . A witness may properly  
 27          invoke the privilege when he "reasonably apprehends a risk of self-incrimination, . . . though no  
 28          criminal charges are pending against him . . . and even if the risk of prosecution is remote."

1 Kotzker thus has the right to assert his Fifth Amendment privilege even though no indictment has  
 2 been returned at the present time.

3           **B. Power of Court to Stay Civil Proceedings in Interests of Justice**

4           In *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970), the Supreme Court noted that,  
 5 “Federal courts have deferred civil proceedings pending the completion of parallel criminal  
 6 prosecutions when the interests of justice seemed to require such action, sometimes at the request  
 7 of the prosecution, (citations omitted).” *See also SEC v. Dresser Industries, Inc.*, 628 F. 2d 1368,  
 8 1375 (D.C. Cir. 1980) – “...a court may decide in its discretion to stay civil proceedings, . . . when  
 9 the interests of justice seem to require such action, sometimes at the request of the prosecution,  
 10 \* \* \* sometimes at the request of the defense. (Citations omitted.)”

11           **C. The Interests of Justice Mandate Imposition of a Stay of the Civil Proceedings  
 12 Because Kotzker’s Fifth Amendment Rights Are Directly Implicated**

13           Kotzker will be unable to defend himself in this civil action in any meaningful fashion  
 14 without implicating his rights under the Fifth Amendment. For example, responding to the  
 15 Complaint; compelling Kotzker to produce documents; responding to interrogatories and sitting  
 16 for deposition, are all testimonial acts protected by the Fifth Amendment privilege.

17           **D. Application of Keating Factors**

18           In *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-325 (9th Cir. 1995), the Ninth  
 19 Circuit stated that:

20           “... The decision whether to stay civil proceedings in the face of  
 21 a parallel criminal proceeding should be made ‘in light of the  
 22 particular circumstances and competing interests involved in  
 23 the case.’ *Molinaro*, 889 F.2d at 902. This means the decision  
 24 maker should consider ‘the extent to which the defendant’s  
25 Fifth Amendment rights are implicated.’ *Id.* In addition, the  
 26 decisionmaker should generally consider the following factors: (1)  
 27 the interest of the plaintiffs in proceeding expeditiously with this  
 28 litigation or any particular aspect of it, and the potential prejudice to  
 plaintiffs of a delay; (2) the burden which any particular aspect of  
 the proceedings may impose on defendants; (3) the convenience of  
 the court in the management of its cases, and the efficient use of  
 judicial resources; (4) the interests of persons not parties to the civil  
 litigation; and (5) the interest of the public in the pending civil and  
 criminal litigation. *Id.* at 903.” (Emphasis and underlining added.)

1     *See also, Taylor, Bean & Whitaker Mortgage Corporation v. Triduanium Financial*, 2009 WL  
 2     2136986 (E.D. Cal. 2009). The application of the *Keating* factors is set forth below:

3                 **1. “The Interest of the Plaintiffs in Proceeding Expeditiously with this  
 4                      Litigation or any Particular Aspect of It, and the Potential Prejudice to  
 5                      Plaintiffs of a Delay” - A Stay Will Not Result in any Prejudice of the  
 6                      FTC**

7                 As an initial matter, the FTC cannot legitimately claim that staying the civil action during  
 8                 the pendency of the criminal investigation will cause any prejudice because there is no evidence  
 9                 that Kotzker is currently engaging in any of the conduct alleged in the Complaint. In addition,  
 10                some of the other defendants have already reached agreements with the FTC.

11                 **2. “The Burden Which Any Particular Aspect of the Proceedings May  
 12                      Impose on Defendant” – Kotzker Will Suffer Undue Prejudice if He is  
 13                      Compelled to Defend Himself Simultaneously in the Civil and Criminal  
 14                      Proceedings**

15                 In contrast to the FTC, Kotzker will suffer substantial and undue prejudice because the  
 16                 absence of a stay would undermine Kotzker's constitutional rights against self-incrimination.

17                 **3. “The Convenience of the Court in the Management of its Cases, and the  
 18                      Efficient Use of Judicial Resources” – A Stay is the Most Efficient Use  
 19                      of Judicial Resources**

20                 In *Taylor, Bean & Whitaker Mortgage Corporation v. Triduanium Financial*, 2009 WL  
 21     2136986 (E.D.Cal. 2009), the District Court stated, in pertinent part, as follows:

22                 Moreover, this case is in the early stages of litigation. No answer  
 23                      has been filed, no scheduling order has been issued, and no  
 24                      dispositive motions have been filed. Cf. *Brown*, 857 F.Supp. at  
 25     1387-92 (denying a motion to stay filed three weeks prior to trial,  
 26     after discovery was completed). “[T]he public’s interest in the integrity of the criminal case is  
 27     entitled to precedence over the civil litigant.” (Emphasis and  
 28     underlining added.)

Just like *Taylor*, the case at hand is in the early stages and no answer has been filed, therefore, a stay of this civil action at the early stage will conserve the judicial resources of this Court.

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1           **4. "The Interests of Persons Not Parties to the Civil Litigation" - The**  
2           **Interests of Non-Parties Weigh in Favor of the Stay**

3           The factor of the interests of third parties and the public—also weigh heavily in favor of a  
4           stay. In addition, a stay will avoid moving forward with civil discovery involving wasteful  
5           depositions and discovery from non-parties, when the resolution of the criminal proceeding could  
6           have a direct impact on issues in the civil action.

7           **5. "The Interest of the Public in the Pending Civil and Criminal**  
8           **Litigation" - The Interest of the Public Favors a Stay**

9           The interest of the public favors a stay because "the public's interest in the integrity of the  
10          criminal case is entitled to precedence over the civil litigant." *Javier H. v. Garcia-Botello*, 218  
11          F.R.D. 72, 75 (W.D.N.Y. 2003) cited by District Court Judge Ilston in *Jones vs. Conte*, Case No.  
12          3:04-cv-05312, Document No. 37, April 19, 2005.

13          **IV. CONCLUSION**

14          Based upon the foregoing, Kotzker respectfully request that the Motion be granted and this  
15          action be stayed as to Kotzker pending the conclusion of the criminal investigation and any other  
16          later proceedings.

17          Oct 3, 2015  
**DATE**

18           **Fabian VanCott**

19           By: 

20           **JEFFREY B. SETNESS**

21           **Attorneys for Defendant Jason A. Kotzker**

**CERTIFICATE OF SERVICE**

In accordance with Rule 49(c) of the Federal Rules of Criminal Procedure and Rule 47-11 of the Local Rules of Practice of the United States District Court for the District of Nevada, I certify that I am an employee of Fabian VanCott and that on this 2<sup>nd</sup> day of October, 2015, I did cause a true copy of:

**NOTICE OF MOTION AND MOTION TO STAY CIVIL ACTION PENDING  
RESOLUTION OF CRIMINAL PROCEEDINGS; MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF JEFFREY B. SETNESS; DECLARATION OF  
JASON A. KOTZKER**

to be served via electronic service by the U.S. District Court CM/ECF system to the parties on the Electronic Filing System in this action.

By: /s/ Sara M. Cameron  
An Employee of  
Fabian VanCott